No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., FIREMAN'S FUND INSURANCE COMPANY, CENTRAL MANUFACTURER'S MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellees,

and

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

APPELLANT SMITH'S OPENING BRIEF.

FILED
SEP 28 1948

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APPELLANT SMITH'S OPENING BRIEF.

A.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

Plaintiff, Central Manufacturers Mutual Insurance Company, is an Ohio corporation and plaintiff, Indiana Mutual Insurance Company, is an Indiana corporation. The defendant Jim Dandy Markets, Inc., and the defend-

ant Fireman's Fund Insurance Company is each a California corporation and defendant E. F. Smith is a resident of California. [R. 2 to 4.]

Plaintiffs seek a declaration of their liabilities under fire insurance policies issued by them to Jim Dandy Markets, a co-partnership, and the predecessor of the defendant Jim Dandy Markets, Inc. Each insured a store building against destruction by fire in the amount of $12,500.00 or a total of $25,000.00. [R. 4 and 5.] The building burned and it developed that it was claimed by defendant E. F. Smith and that he had insured it with the Fireman's Fund Insurance Company for $16,700.00. [R. 6.] The present action is for the determination and declaration of the rights and liabilities of plaintiffs under their policies. [R. 8 and 9.]

The jurisdiction of the Federal Court is predicated on the diversity of citizenship between the plaintiffs and defendants and on the fact that more than $3000.00 is involved in the controversy as authorized by Title 28, U. S. C., Section 41 (1) (b).

B.

STATEMENT OF THE CASE.

A store building known as the Atlantic Market in Bell, California, was destroyed by fire. The defendant, Jim Dandy Markets, Inc., formerly Jim Dandy Markets, a co-partnership claiming ownership, had insured the building with the plaintiff companies for a total of $25,000.00. [R. 4 and 5.] Defendant E. F. Smith also claimed the building and had insured it with the defendant Fireman's Fund Insurance Company for the sum of $16,700.00. [R. 6.]

After the fire the plaintiff insurance companies brought the instant action for the purpose of having its rights determined and declared. [R. 9.]

Defendant E. F. Smith answered the complaint and alleged that he is the sole owner of the building in question [R. 20], and that defendant Jim Dandy Markets, Inc., was in possession thereof only as tenant and sub-tenant of defendant Smith [R. 23], all as provided in an agreement between them. [R. 27.] He asked the court to declare that he was the owner of the building and that the ownership constituted an insurable interest therein. [R. 26.]

Defendant Smith also filed a cross-claim against defendant Jim Dandy Markets, Inc., alleging that it had come to his attention that the defendant Jim Dandy Markets, Inc., claimed that the assignment of the ground lease on which the Atlantic market was situated carried with it and conveyed title to the building built by defendant Smith. The cross-claim then alleges that if such construction should prevail, the assignment [R. 86], should be reformed as not being in accordance with the agreement of the parties, having been executed by mutual mistake. [R. 42 and 43.]

Defendant Smith thus submitted to the court two claims, one, the building in question belonged to him and was never transferred, and, two, if the assignment is construed as transferring the building, then it was executed by mistake and should be reformed so as not to convey the building.

The ultimate question to be determined is who owned the store building which was destroyed by fire on January 14, 1947. If the building belonged to defendant Smith or he had an insurable interest therein, he is entitled to be

paid on the insurance policy written for him by the defendant Fireman's Fund Insurance Company. If the building had been transferred to Jim Dandy Markets and it held the insurable interest therein, then it is entitled to collect on the insurance policies written for it by the plaintiffs.

Defendant Jim Dandy Markets claimed to be the sole and unconditional owner of the building by virtue of the assignment of the lease and that it was entitled to collect insurance from the plaintiff companies.

C.

SPECIFICATION OF ERRORS.

Appellant E. F. Smith hereby specifies and will rely upon errors as follows:

1. The judgment is contrary to the law and the evidence:

(a) In adjudicating that defendant Jim Dandy Markets, Inc., was the sole unconditional owner of the building known as the Atlantic Store; and

(b) In adjudicating that the assignment of lease dated June 27, 1946, conveyed to the predecessors in interest of defendant E. F. Smith to the building destroyed by fire;

(c) In adjudicating that there is no showing of mutual mistake or any mistake in the execution of said assignment;

(d) In adjudicating that the defendant Fireman's Fund Insurance Company is entitled to go hence.

2. That part of Finding of Fact XII that at the time the building known as the Atlantic Store was destroyed by fire on January 14, 1947, the defendant Jim Dandy Markets, Inc., was the sole and unconditional owner of said building, is contrary to the evidence.

3. That part of Finding XVI that on June 27, 1946, defendant E. F. Smith sold, assigned and transferred to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all of his right, title and interest in said building and that at no time subsequent thereto did said E. F. Smith have any interest in said building other than a lien for the payment of the purchase price thereof, is contrary to the evidence.

4. That part of Finding of Fact XVII that in accordance with the agreement entered into between the defendant E. F. Smith and the predecessors of the defendant Jim Dandy Markets, Inc., on June 27, 1946, and by the terms thereof and by the assignment of lease found by the Court, the defendant E. F. Smith sold, assigned and transferred to the predecessors of the defendant Jim Dandy Markets, Inc., all right, title and interest in and to the building referred to in the findings, is contrary to the evidence.

5. That part of Finding XVII that there was no other or different agreement between said parties than as evidenced by said written assignment and the said written assignment embodied the entire agreement between the parties thereto, is contrary to the evidence.

6. That part of Finding XVII that the written agreement, consisting of Exhibits "7," "8," "9," and "10," constituted the entire agreement, correctly expressed the intention of the parties thereto and that there was no mistake either mutually or otherwise in the drafting of said assignment, which intended to and was effective in conveying from the defendant E. F. Smith to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all the right, title and interest of said defendant E. F. Smith in and to said building, is contrary to the evidence.

7. That part of Finding XIX that it was not true that during the negotiations and the discussions between the defendant E. F. Smith and the predecessors in interest of the defendant Jim Dandy Markets, Inc., or their brokers or agents, the building was not considered as a subject of the proposed sale, is contrary to the evidence.

8. That part of Finding XIX that it is not true that the value of said building was in nowise considered as an element of the sales price agreed upon, is contrary to the evidence.

9. That part of Finding XIX that it is not true that said assignment found by the Court does not correctly contain the agreements between the defendant E. F. Smith and the predecessors in interest of the defendant Jim Dandy Markets, Inc., is contrary to the evidence.

10. That part of Finding XIX that it is not true that defendant E. F. Smith did not intend to convey said building to the predecessors in interest to convey said building

to the predecessors in interest of the defendants Jim Dandy Markets, Inc., and that defendant E. F. Smith did intend to convey said building by said assignment to the predecessors in interest of the defendant Jim Dandy Markets, Inc., is contrary to the evidence.

11. That part of Finding XIX that defendant E. F. Smith, at the time he executed the assignment found by the Court, intended to convey and did convey to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all of his right, title and interest to said building, is contrary to the evidence.

12. That part of Finding XX that it is true that at the time said building was destroyed by fire on January 14, 1947, Jim Dandy Markets, Inc., was the sole and unconditional owner of the leasehold previously owned by defendant E. F. Smith, including the right to the building on said premises, is contrary to the evidence.

13. That part of Finding XX that it is not true that said assignment found by the Court was executed by the defendant E. F. Smith under the mistaken belief that the building destroyed by fire was not conveyed by said assignment and it is not true that said assignment does not truly express the intention of the parties to said assignment and on the contrary that said assignment does truly express the intention of the parties thereto, is contrary to the evidence.

D.

ARGUMENT.

Summary.

Defendant Smith contends that he was at all times the owner of the building and it was never transferred from himself. And the facts are that at no time in the entire transaction, either orally or in any document whatsoever, was the building mentioned or any reference made to it except to establish and recognize the title of Smith.

Defendant Jim Dandy Markets contends that even though the building is not mentioned at any time or in any manner as being transferred, nevertheless, by operation of law, it was transferred by an assignment from Smith to Jim Dandy Markets of the land lease on which the building was situated. The position seems to be and the Trial Court seems to have erroneously held that such operation of law is strong enough to overcome a complete unanimity of documentary and oral evidence that the building was not a part of the subject matter to which title was to be transferred.

The assignment is only a document executed in fulfillment of the agreement. It was not negotiated and its terms were not given direct and individual consideration by the parties.

The argument will be broken down to the following headings:

The Assignment of the Lease Did Not Convey the Building to Jim Dandy Markets.

(1) The parties did not intend to convey the building.

(2) The building was personal property and not a part of the lease.

(3) The assignment was not consummated.

If the Assignment Is Construed as Conveying the Building and the Insurable Interest to Jim Dandy Markets, Then It Should Be Reformed as Having Been Executed by Mutual Mistake and Without Consideration.

(1) The mistake of the parties.

(2) The intention of the parties.

(3) Equitable and conscientious agreement.

Facts.

All the evidence in this case consists of written documents and stipulations except oral testimony of defendant Smith, his agent Mr. Johnston, and his attorney Mr. Cassidy. There is, therefore, no conflicting testimony and it is only necessary to interpret and apply the evidence before the court.

The defendant Jim Dandy Markets, Inc., a corporation, is the successor to Jim Dandy Markets, a co-partnership, referred to in most of the agreements. [R. 157] In this brief, reference will be made to Jim Dandy Markets without identification as to whether it is the corporation or the partnership, as the change is not pertinent to this case.

The primary facts will now be enumerated in two groups, those relating to the original agreement, and those relating to the supplementary and modified agreement.

The Original Agreement.

On July 1, 1945, Appellant Smith was the operator of a chain of eight retail stores in Los Angeles and San Bernardino Counties. Four of the markets were owned outright by Smith and four were operated on land leased by him. [R. 27].

The agreement dealt with five basic transactions:

(a) Smith agrees to sell all salable merchandise in the eight stores [R. 30]. This was a completed transaction and is not pertinent to the instant action.

(b) Smith leased to Jim Dandy Markets "all store fixtures and equipment" for ten years at a monthly rental of $1400.00 [R. 31].

(c) Smith agreed to lease all stores owned outright by him to Jim Dandy Markets for a period of ten years at a specified rental for each [R. 32]

(d) Smith agreed to sublease the four stores, of which he was lessee, to Jim Dandy Markets for a term of ten years, with provisions for meeting the contingency of different renewal dates or other variable in the terms of the respective leases [R. 33].

(e) Smith granted to Jim Dandy Markets an option to purchase "all fixtures and equipment" in all of said stores for $192,500.00 cash, which option "cannot be exercised until the expiration of said ten years" [R. 38].

Among other details Smith agreed to pay all taxes and keep all fixtures insured at his expense [R. 39].

Jim Dandy markets went into possession at the beginning of the morning of July 5, 1945, and remained in possession until the time of the fire, January 14, 1947 [R. 163].

The Atlantic market was located on two parcels of land and Smith was the lessee of each parcel. Each ground lease provided that Smith was the owner of the improvements on the premises and that all additional improvements placed there during the term of the lease should belong to him and could be removed by him at the expiration of the term. [R. 58 and 63.]

Pursuant to the original agreement, Smith executed a sublease of the Atlantic store to Jim Dandy Markets. Two different references are made in the sublease to buildings now on said property now owned by Smith. [R. 197 and 199.]

Smith insured all buildings of the various stores including the Atlantic store with the defendant Fireman's Fund Insurance Company, which policy was in effect at noon, July 5, 1945, and thereafter until and at the time of the fire. [R. 153, 154.]

Pursuant to the agreement [R. 31] and to the sublease [R. 200], an inventory was made of the fixtures and equipment. [R. 207 to 214, incl.]

The Supplementary and Modified Agreement.

After the original agreement had been in operation about eleven months [R. 274], the defendant Smith was approached by Mr. Schuster, one of the Jim Dandy Markets group, with the idea of purchasing the markets instead of continuing the lease for another nine years. [R. 273 and 278.] The transfer of the Atlantic market building or the lease was not mentioned, but reference

made only to the taking up of the "option." [R. 280 and 281.]

The transaction as to the original agreement and as to the supplementary and modified agreement was handled for Mr. Smith by his agent, Mr. Johnston [R. 283], who testified that during the negotiations for the original agreement the partners examined the leases and discussed the fact that Mr. Smith had built the buildings on leased ground and was the owner of the buildings at the Atlantic and the Ontario Markets. [R. 285.] This was the only discussion ever held with any of the Jim Dandy Markets group or their agents relative to the buildings. [R. 285 and 291.]

The lawyer who drew the papers for Mr. Smith never talked about the buildings to any one. [R. 297.] His instructions did not mention the building but referred to the inventory in the lease, certain fixtures and equipment. [R. 298.] He had no instructions relative to the titles of the buildings situated on the respective leases, but drew all assignments of leases as an ordinary assignment and in the same manner. [R. 300.] It was stipulated that the assignments on all of the various markets were in the same form as the assignment of the lease on the Atlantic market. [R. 267.]

The supplementary and modified agreement, dated June 12, 1946, was drawn under the circumstances just described and changed the original agreement in certain essentials as follows:

(a) Smith agreed to sell "fixtures, machinery and equipment" for a price of $225,000.00 on certain instalment payments as therein provided. [R. 65 and 66.]

(b) An escrow was to be opened and a bill of sale of the "fixtures, machinery and equipment" placed therein, together with the original leases and assignments thereof on each of the markets leased by Smith including the Atlantic market. [R. 67 and 68.]

(c) The lease under the original agreement upon the "fixtures, machinery and equipment" was cancelled and terminated as of the first day of July 1946. [R. 68 and 69.]

(d) With reference to the leases and written assignments thereof, the subleases pertaining to the same subject matter "shall be deemed cancelled and terminated as of the date of delivery from escrow of the leases and assignments thereof." [R. 69.]

(e) The documents in escrow were to be delivered to Jim Dandy Markets when the full purchase price was paid on any or all of the markets. [R. 69 and 70.]

(f) A separate value was placed on each of the eight markets including the Atlantic Boulevard market, which value was fixed at $27,300.00. [R. 70.]

(g) The Jim Dandy Markets agreed on and after the first day of July 1946 to keep the "fixtures, machinery and equipment" fully insured with loss payable to Smith until the full purchase price had been paid. [R. 72 and 73.]

(h) Except as modified, the original agreement remained in full force and effect. [R. 73.]

As provided in the supplementary and modified agreement, an escrow was opened and the papers placed therein [R. 252], including the bill of sale [R. 84], the ground

leases on the Atlantic market sites [R. 56 and 61], and the assignment of the leases on the Atlantic market. [R. 86.] These documents were still in escrow at the time of the fire. [R. 148.]

The Atlantic market building was totally destroyed by fire on the morning of January 14, 1947. [R. 143.] An adjuster's agreement established the loss from the burning of the building at $32,476.92. [R. 194.]

The assignment provided that it should not become effective until the assignee had paid the full purchase price fixed in the supplementary and modified agreement and had complied with all of the terms and conditions in any way affecting the leased property as set forth in the original agreement and in the supplementary and modified agreement. The assignment then provided that the sublease then in existence on the property should be null and void "upon this assignment going into effect." [R. 87.] It further provides, as does the supplementary and modified agreement, that if the lessor's approval is necessary and is not secured, the sublease shall remain in effect. [R. 87, 88.]

The Assignment of the Lease Did Not Convey the Building to Jim Dandy Markets.

(1) The Parties Did Not Intend to Convey the Building.

The intention of the parties must be determined from all the contracts and documents making up the transaction between Smith and Jim Dandy Markets. Particular clauses are subordinate to the general intent and words which are wholly inconsistent with the main intention are to be rejected. This is the California law as established in the following sections of the Civil Code.

Sec. 1642. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction are to be taken together."

Sec. 1650. "Particular clauses of a contract are subordinate to its general intent."

Sec. 1653. "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected."

An examination of the contracts between the parties discloses that the physical properties of the eight markets were separated into three categories: The merchandise [R. 30], which was immediately sold for cash and did not again become involved in the transaction; the fixtures and equipment [R. 31 and 65]; and the real property and stores. [R. 32 and 33.]

Under the original agreement the fixtures and equipment were leased for ten years [R. 31] with an option to purchase at the end of the ten year period. [R. 38.] The supplementary and modified agreement was a contract of sale [R. 65 and 66] of the same subject matter and the same items. The bill of sale [R. 85] which was placed in escrow specifically refers to the inventory of the fixtures and equipment which has been prepared in accordance with the original agreement and the sublease.

As to the real property and stores, the original agreement merely established Jim Dandy Markets as a tenant of the premises—the stores owned outright by Smith were leased by him to Jim Dandy Markets [R. 32] while the stores of which he was the lessee were subleased to Jim Dandy Markets. [R. 33.] The supplementary and modified agreement did not change the leases of the

stores owned outright by Smith except to provide that Jim Dandy Markets might sublease them without Smith's consent. [R. 71.] The subleases were to remain in effect until the full purchase price was paid and the escrow closed on each store [R. 69], whereupon the assignment of the lease was to be delivered to Jim Dandy Markets.

The language of the contract does not indicate that the assignment was for any purpose other than as a convenient way of handling the leased property when Smith's interest in the fixtures and equipment was terminated. In fact, it is clear that the parties were still considering this merely as a method of providing the place where Jim Dandy Markets could continue to conduct business with the fixtures and equipment purchased from Smith. Thus, the supplementary and modified agreement provides that if permission of the lessor is necessary to the assignment of the lease and is not secured, then the sublease shall continue in effect. [R. 68.]

An extremely emphatic indication of the intention of the parties to not include the building as a part of the property sold to Jim Dandy Markets is found from a consideration of the purchase price. The original agreement granted Jim Dandy Markets an option to purchase the fixtures and equipment for the sum of $192,500.00 after paying rent for them for ten years at $1,400.00 per month. [R. 38.] This option, by no stretch of the imagination, was to include the price of the buildings on the Atlantic and Ontario sites. Not only is this clear from the language used but the Atlantic building was not included in the Atlantic inventory. [R. 207.] The purchase negotiated at the end of one year instead of under the option at the end of ten years was at an in-

creased price of $225,000.00. The reason for the increase is clearly explained in the testimony of Mr. Smith in response to the questions of the trial judge, that is, he would be deprived of nine years rent by selling the property at the time he did. [R. 304.] Not only is this reason unanswered in any manner; it is mathematically obvious.

Furthermore, as pointed out above in the recital of facts, the building was never mentioned by any of the parties at any of the negotiations for the supplementary and modified agreement, although, according to the testimony of Mr. Johnston, which is not questioned in any manner, the entire negotiations were over the establishment of the price to be paid for the privilege of immediately exercising the option. [R. 289 and 290.] If the buildings were to be added to the inventory of the property sold, it is inconceivable that they would not have been mentioned in the price negotiations. The price was increased from $192,500.00 under the option [R. 38] to $225,000.00 in the supplementary and modified agreement [R. 66], an increase of $32,500.00. The adjuster's agreement fixed the value of the Atlantic store building when it was destroyed by fire at $32,476.92. [R. 194.] If it were the intention to transfer the Atlantic store building with the fixtures and equipment, then Smith was actually reducing the amount to be paid below the option price instead of getting some compensation for the loss of rent as he testified. [R. 304.] Furthermore, the building at Ontario was in the same category. [R. 285.] There is no evidence as to the value of that building, but, at least argumentatively, it can be suggested and undoubtedly the court will take judicial notice of the fact that it had at least a reasonable value. Whatever the value, it

would constitute an additional discount if it were to be transferred under the supplementary and modified agreement.

The insurance provisions in the contracts are further evidence that there was no intention to convey the building. Under the original agreement, Smith agreed to pay all taxes on the fixtures and equipment and keep them insured at his own expense. [R. 39 and 40.] Under the supplementary and modified agreement Jim Dandy Markets agreed to pay the taxes and the insurance with a loss clause payable to Smith. [R. 72 and 73.] This was done on the Atlantic fixtures and equipment. [R. 205.]

On the other hand, nothing is said in either agreement or anywhere about insurance on the store buildings. It was apparently taken for granted that as usual the lessor and owner would protect himself. Smith did so by insuring the buildings with the defendant Fireman's Fund Insurance Co. If the buildings were to be transferred, the contract would have provided that they be insured by Jim Dandy Markets with a loss payable clause, the same as the fixtures and equipment.

The original agreement and the supplementary and modified agreement contain the provisions which were negotiated and studied by the parties and therefore must be given the most weight in determining the intention of the parties. The assignment is merely an executing document. If the assignment of the lease had not been made, and it now became the duty of the court to make the assignment, the court would not transfer the title of the buildings to Jim Dandy Markets, but would only assign the ground lease.

There is nothing in any written or oral statement which shows an intention to transfer title to the building, except

under the general principle of law that an assignment of a lease usually carries all the appurtenances with it. To give this much weight to the assignment is to allow it to overcome the intention of the parties and is placing the particular words in the assignment above the general intent, both of which are contrary to the provisions of the California Code as above quoted.

The California Supreme Court, in bank, last June sustained the application of these rules in the case of *Simmons v. California Institute of Technology,* 194 P. 2d 521; 31 A. C. 244. The Court considered the two documents involved in the transaction and concluded that the word "employment" meant permanent employment although cases held that it only meant employment at will. The Court said the cases:

> "furnish no obstacle to recognizing the contract actually made by the parties. These cases do not indicate that where the intent is discoverable pursuant to applicable rules it will not be given effect accordingly."

(2) The Building Was Personal Property and Not a Part of the Lease.

The building on the Atlantic market was built there by defendant Smith. [R. 285.] The fact that it belonged to him and could be removed is explicitly set out in each of the two leases covering each of the two parcels of land on which the Atlantic market was situated. [R. 58 and 63.] The building is thus personal property, was not and never was a part of the realty or an appurtenance of the lease, and it was not conveyed by the assignment. Being personal property, any conveyance should be by bill of sale, but it was not one of the items listed in the bill of sale [R. 207] which was executed to convey the personal prop-

erty to be sold under the supplementary and modified agreement.

The California law clearly recognizes the right of the parties to thus make personal property out of what would otherwise be realty or a fixture. Thus the lessee, under a lease with a provision similar to the instant one, conveyed fox kennels and fencing by bill of sale and it was sustained in the case of *Clark v. Talmadge,* 74 P. 2d 825, 23 Cal. App. 2d 703.

The same rule applies to buildings as held in the case of *Bowman v. Union Trust Co.,* 106 P. 2d 913, 41 Cal. App. 2d 397.

(3) The Assignment Was Not Consummated.

The assignment was executed and placed in the escrow as provided in the supplementary and modified agreement. [R. 252.] The assignment itself provided [R. 87] as did the supplementary and modified agreement [R. 69] that the assignment shall not become effective and that the sublease should remain in effect and be cancelled and terminated only after delivery of the leases and assignments thereof from escrow. The assignments, together with the other papers, were still in escrow at the time of the fire. [R. 148.]

At the time of the fire, Jim Dandy Markets was the tenant of the property in question under the sublease from the defendant Smith. He had nothing but an expectancy to get the building after completing the payment of the purchase price for the personal property. There was no

contract to pay any purchase price for the lease or the building. If the building by any interpretation was to be transferred to Jim Dandy Markets, it was only because of the fact that it was appurtenant to the lease and went with the assignment.

If Jim Dandy Markets secured any interest in the building under the contract it is only a naked expectancy or option. Since the option had not been exercised and the expectancy had not arrived, defendant Smith still owned the insurable interest in the building as established by the recent California case of *Vierneisel v. Rhode Island Insurance Co.,* 175 P. 2d 63, 77 Cal. App. 2d 229, where the court said:

> "In the present case the conditions of the escrow were not certain to happen and title did not pass until plaintiffs had complied with the conditions of the escrow and were entitled to receive the deed. Therefore, on the date of the fire the Ferreros were the legal owner of the property which was destroyed."

In the case now being considered by the court, there was no assurance that Jim Dandy Markets would make all payments on the fixtures and equipment as provided in the supplementary and modified agreement and if it did not do so, defendant Smith could do nothing to enforce the contract so far as the assignment was concerned beyond a repossession of the realty.

Smith was the sole and unconditional owner of the property at the time of the fire and entitled to collect the insurance.

If the Assignment Is Construed as Conveying the Building and the Insurable Interest to Jim Dandy Markets, Then It Should Be Reformed as Having Been Executed by Mutual Mistake and Without Consideration.

The Civil Code of California provides as follows:

> Section 3399. "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."
>
> Sec. 3400. "For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement."
>
> Sec. 3401. "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be."

(1) The Mistake of the Parties.

As pointed out in the statement of facts above, the building was never mentioned between defendant Smith and his agents and the Jim Dandy Markets or any of its agents. [R. 280, 281, 285, 291, 298.] It is also hereinbefore pointed out that at no time in any of the agreements or documents drawn in consummation of the agreements was there one word expressing an intention to convey or conveying the building. Jim Dandy Markets is of necessity only relying on the general legal principle that

the assignment of the lease carried the building with it. There can be no question but that any conveyance of the building was a mistake so far as defendant Smith was concerned and he testified directly to the fact that he did not understand and had no suspicion at any time that the assignment would convey the Atlantic market building. [R. 303, 304.]

There is no direct evidence of what the Jim Dandy Markets group had in their minds, either collectively or individually—they did not testify. The surrounding facts and circumstances conclusively show that they knew or "suspected" that Smith did not understand the building was to be transferred. The building was never mentioned; nothing was done to indicate that it was being treated differently than other buildings which were merely leased; the negotiations for the supplementary and modified agreement dealt only with price, and the mention of the transfer of the building would have given Smith another argument for increasing the price to a much greater extent; many other facts which have already been set out more completely lead to the same conclusions.

There is one additional bit of evidence which has not heretofore been mentioned—within a few days after the supplementary and modified agreement went into effect Jim Dandy Markets insured the building. Nothing was said to Smith about it and he was allowed to maintain insurance at the same time. As heretofore pointed out, the insurance on the fixtures and equipment was handled in the usual and business-like manner and provision therefor made in the agreements. If Jim Dandy Markets knew that this building was to be transferred and if they were not concealing and withholding such fact from Smith, they would have called attention to it and the insurance of

the building would have been provided for in the agreement in the usual and business-like manner.

It seems inescapable that Jim Dandy Markets knew or "suspected" that Smith did not know it could be claimed the building was to be transferred by the assignment of the lease.

In the case of *Baines v. Zuieback,* 191 P. 2d 67, 84 A. C. A. 609, 85 A. C. A. 75, the California courts sustained the reformation of a sublease and pointed out the difficulty of proving the defendant's state of mind and said:

> "Whether appellant knew or suspected respondent's mistake was not susceptible of direct proof, except by the testimony of appellant. The mistake of respondents was clearly established. The circumstances and appellant's own testimony tended to prove that he 'knew or suspected' it."

Another California case reformed an agreement to sell the "Montecito Hotel" so as to include the furniture as well as the building in the case of *Bisno v. Herzberg,* 170 P. 2d 973, 75 Cal. App. 2d 235. The court points out that the rule that the evidence of mistake or fraud in the execution of a writing which is offered for reformation must be clear and convincing is not a requirement of unanswerable evidence and says:

> "If a mere denial by a defendant that he was mistaken or that he had committed a fraud were sufficient as a matter of law to prevail against the testimony of the party who claims that the writing offered for reformation does not express the true agreement of the parties, rarely or never could a plaintiff in such an action prevail."

The Court then points out that the plaintiff's understanding was that the furniture was to be included, that there was discussion of income, etc., which was pertinent to the use of the hotel and then says:

> "The fact that no mention was made by Herzberg in his conversation with Bisno and Snader of his desire to sell the furniture or of respondent's need of it, or the difficulty the latter might experience in acquiring such articles as would be indispensable to the conduct of the hotel—such facts supply inferences in support of the testimony of respondent."

(2) Intention of the Parties.

It has already been pointed out that, except for the legal effect of the assignment, it is clear that the intention is not to convey the building. The legal effect—not specific words—of a consummating document is meager support to convey a $35,000.00 building without consideration. The mistake should be corrected by reforming the assignment to conform to the intent of the parties and so as to assign the ground lease only and leave the title of the building in defendant Smith. This in turn would create the insurable interest with him and the declaration of the Court should be accordingly so that defendant Smith can collect on his insurance policy from the Fireman's Fund Insurance Company.

(3) Equitable and Conscientious Agreement.

It was heretofore pointed out in the discussion of the intention of the parties that if the building was conveyed, it would be utterly without consideration. This is of double importance in considering the revision of the contract because of Section 3400 of the Civil Code, set out

above. Following the dictate of that section, and presuming that all the parties intended to make an equitable and conscientious agreement, can only lead to the conclusion that there was a mutual mistake and that the assignment should be reformed so as to clearly not convey title to the building.

Argument Applied to Specification of Errors.

The argument has been addressed to the entire case and it is believed that no extended argument is necessary in applying it to the specification of errors except to point out wherein each applies under the argument already presented.

(1) The first assignment of error is that the judgment is contrary to the law and the evidence and is covered in the entire argument.

(2) That part of finding XII that the defendant Jim Dandy Markets was the sole and unconditional owner of the building is contrary to the evidence that it originally belonged to Smith and was not transferred.

(3) That part of finding XVI that defendant Smith sold, assigned, and transferred all his rights in said building to Jim Dandy Markets is contrary to the evidence that Smith only subleased the building to Jim Dandy Markets and was still the lessor thereof at the time of the fire. Jim Dandy Markets was occupying the building as lessee.

(4) That part of finding XVII that defendant Smith sold and assigned his interest in the building to Jim Dandy Markets is contrary to the evidence. He only subleased it to them.

(5) That part of finding XVII that there was no other or different agreement between the parties than the written assignment and that said written assignment embodied the entire agreement is contrary to the evidence, which, without any dispute, shows a whole series of documents of which the assignment was only one.

(6) That part of finding XVII that certain exhibits—the assignment of the lease, the supplementary and modified agreement, the escrow instructions, and the bill of sale—constituted the entire agreement between the parties is contrary to the evidence. The supplementary and modified agreement itself provides [R. 73] that the original agreement shall remain in full force and effect except as modified and there can be no reasonable contention that all the documents before the Court were each a part of a series of documents constituting one agreement.

(7) That part of finding XIX that it was not true that defendant Smith did not consider the building as a subject of the proposed sale is contrary to the evidence as the only evidence on the subject is that the building was never discussed or mentioned in any manner whatsoever.

(8) That part of finding XIX that it is not true that the value of the building was in nowise considered an element of the purchase price is contrary to the evidence for the reason that defendant Smith and the other witnesses testified without contradiction that the building was never considered.

(9) That part of finding XIX that it is not true the assignment does not correctly contain the agreement is contrary to the evidence for all the reasons set out above showing the intention of the parties, etc.

(10) That part of finding XIX that it is not true that Smith did not intend to convey the building and that Smith did intend to convey it is contrary to the evidence. Smith's testimony in that regard is uncontradicted and unanswered and is in keeping with the evidence shown in the documents themselves.

(11) That part of finding XIX that it is true that defendant Smith did intend to convey and did convey his title and interest in the building is contrary to the evidence because of his own testimony which is uncontradicted but is supported by the documentary evidence before the Court.

(12) That part of finding XX that it is true that the Jim Dandy Markets on January 14, 1947, was the sole and unconditional owner of the leasehold including the right to the building on said premises is contrary to the evidence as the assignment of the leasehold had not been consummated and the building was never transferred.

(13) That part of finding XX that it is not true that the assignment was executed under the mistaken belief that the building was not conveyed by said assignment is not true and is contrary to the evidence. Smith's testimony is to the contrary and uncontradicted.

Conclusion.

Giving full effect to the entire agreement and the intention of the parties as ascertainable therefrom, the assignment was of the ground lease only and did not convey the building from Smith to Jim Dandy Markets.

If a legal technicality caused the building to be transferred to Jim Dandy Markets because it happened to be resting on the land covered by the ground lease, then the assignment should be reformed so as to convey only the ground lease, as intended by the parties.

Giving full effect to the principles of equity and the direct provision of the Code, it must be presumed that all the parties to a contract intended to make an equitable and conscientious agreement. It is not equitable and conscientious to cause Smith's building to be conveyed from him to Jim Dandy Markets without any compensation whatsoever. Courts of equity were founded for the purpose of overcoming such harsh results from the application of technical provisions of law.

The entire record is before the Court and there is no issue to be retried and this Court should direct judgment that defendant Smith was the sole and unconditional owner of the building in question and entitled to collect his insurance thereon.

Respectfully submitted,

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Dated: September 23, 1948.